

113 FERC ¶ 61,163  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

American Electric Power Service Corporation  
AEP Texas Central Company

Docket No. EC04-121-000

ORDER AUTHORIZING DISPOSITION  
OF JURISDICTIONAL FACILITIES

(Issued November 17, 2005)

1. On June 18, 2004, American Electric Power Service Corporation (AEP), acting on behalf of its electric utility affiliate, AEP Texas Central Company (AEP Texas or Applicant) filed an application under section 203 of the Federal Power Act (FPA).<sup>1</sup> The application requests Commission authorization for a proposed disposition of jurisdictional facilities associated with the sale of AEP Texas's 7.81 percent undivided ownership interest in the 690 megawatt (MW) Oklaunion Unit No. 1 (Facility) to the City of Brownsville, Texas, acting by and through the Brownsville Public Utilities Board (Brownsville), or alternatively, to Brownsville and the Oklahoma Municipal Power Authority (OMPA)(together, the Transaction). The Commission authorizes the disposition as consistent with the public interest.

**I. Background**

2. AEP Texas is a subsidiary of AEP and a public utility that generates, transmits and distributes electric retail and wholesale energy in south Texas. AEP is a registered holding company under the Public Utility Holding Company Act of 1935.<sup>2</sup>

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<sup>1</sup> 16 U.S.C. § 824b (2000).

<sup>2</sup> 15 U.S.C. § 79 (2000) (which has recently been amended by the Energy Policy Act of 2005, Pub. L. No. 109-58, §§ 1261-1277, 119 Stat. 594, 380 (2005)).

3. Brownsville is a municipal electric utility in the Rio Grande Valley that depends on AEP Texas for transmission service. OMPA, an Oklahoma governmental agency, is a wholesale power supplier to 35 municipalities in Oklahoma and also supplies contract capacity and supplemental energy to three cities in Kansas. OMPA is a member of the Southwest Power Pool (SPP) and relies, in part, on AEP Texas's transmission system. OMPA currently has an 11.72 percent interest in the Facility.

4. As discussed in an earlier Commission order,<sup>3</sup> AEP Texas previously agreed to sell its interest in the Facility to Golden Spread Electric Cooperative, Inc., subject to a right of first refusal by any of the joint owners of the Facility. The Applicant states that Brownsville gave AEP Texas notice of its exercise of its right of first refusal, and on May 25, 2004, AEP Texas entered into a confidential purchase and sale agreement with the City of Brownsville (Brownsville Purchase Agreement). The Purchase Agreement provides for the sale by AEP Texas to Brownsville of the entire AEP Texas interest in the Facility, subject to the exercise by any other joint owner of the facility of its right of first refusal. OMPA is also the holder of a right of first refusal and, on May 5, 2004, it notified AEP Texas that it also intended to exercise its right of first refusal for the AEP Texas interest.

5. AEP Texas states that if it determines that OMPA has properly exercised its right of first refusal, and this results in an agreement between AEP Texas and OMPA to transfer all or part of the AEP Texas interest to OMPA, AEP Texas will enter into a purchase and sale agreement with OMPA that would be substantially the same as the Brownville Purchase Agreement. On September 16, 2004, AEP Texas and OMPA entered into a purchase and sale agreement relating to the AEP Texas Interest (OMPA Purchase Agreement). The Applicant notes that section 33.2(f) of the Commission's regulations requires that applications under section 203 include all "contracts related to the proposed transaction together with copies of all other written instruments entered into or proposed to be entered into by the parties to the Transaction."<sup>4</sup> Accordingly, on October 26, 2004, the Applicant submitted to the Commission in this docket the OMPA Purchase Agreement.

6. In addition, there is an issue regarding expansion of the AEP Texas system necessary for OMPA to move power from the Facility to its customers in Oklahoma. We addressed that issue in the May 28 and March 4 Orders, in which we advised OMPA to file a complaint under FPA section 206. It did so, and we granted OMPA's complaint

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<sup>3</sup> *American Electric Power Company, Oklahoma Electric Generating Cooperative Inc., Golden Spread Electric Cooperative, Inc.*, 107 FERC ¶ 61,209 (2004) (May 28 Order).

<sup>4</sup> 18 C.F.R. § 33.2(f) (2004).

and required AEP to file an unexecuted service agreement under its open access transmission tariff by April 3, 2005. On December 6, 2004, OMPA filed a complaint requesting that the Commission direct AEP to file an unexecuted service agreement for the network transmission service OMPA requested to facilitate OMPA's contracted-for acquisition of an increased ownership in Oklaunion Unit No. 1. The Commission granted OMPA's complaint and found that AEP was required under its open access transmission tariff to file the unexecuted service agreement.<sup>5</sup> On April 25, 2005, AEP filed an unexecuted Network Integration Transmission Service Agreement (NITSA) to comply with the March 4 order. On July 25, 2005 the Commission issued an order that accepted AEP's NITSA, subject to AEP filing a revised NITSA with the Commission within 30 days.<sup>6</sup> On August 24, 2005, as amended September 21, 2005, AEP filed an unexecuted NITSA in compliance with the Commission's July 25 Order. The Commission will issue a letter order (concurrently with the instant order) in Docket No. EL05-38-003 accepting AEP's September 21, 2005 NITSA.

7. The Facility is a low-sulfur coal-fired steam generating unit with a maximum net capacity of 690 MWs located in Wilbarger County, Texas. To comply with the state statutes and regulations requiring the unbundling of electric transmission and generation activities,<sup>7</sup> AEP Texas proposes to sell its 7.81 percent interest in this Facility to Brownsville and OMPA in shares that are proportionate to the current relative Oklaunion ownership interests of Brownsville and OMPA. The jurisdictional facility associated with the Transaction is an undivided 7.81 percent ownership interest in a generator step-up transformer.

## **II. Notice and Further Filings**

8. Notice of the application was published in the *Federal Register*, 69 Fed. Reg. 40,892 (2004), with interventions or comments due on or before July 9, 2004. OMPA filed a timely motion to intervene and comments.

9. OMPA supports the application. OMPA also states that power from the Facility, which is located just south of the North DC tie between the Electric Reliability Council of Texas (ERCOT) and the SPP, must cross that tie to serve OMPA's load in the SPP. OMPA notes that it has asked AEP to commit to transmit power from the additional

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<sup>5</sup> *Oklahoma Municipal Power Authority*, 110 FERC ¶ 61,228 (2005) (March 4 Order).

<sup>6</sup> *Oklahoma Municipal Power Authority v. American Electric Power Service Corp.*, 112 FERC ¶ 61,107 (2005) (July 25 Order).

<sup>7</sup> *See* Texas Public Utility Regulatory Act, Texas Utilities Code § 39.051 (2004); 16 TAC § 25.342(d)(2) (2004).

share of the Facility (obtained from the exercise of its right of first refusal) through additional tie capacity that AEP would construct and that OMPA would fund (with appropriate credits to be later resolved, if necessary). OMPA states that its dispute with AEP as to whether AEP has an obligation to construct an addition to the DC tie was resolved by the May 28 Order.

10. On July 20, 2004, AEP filed an answer to OMPA's motion to intervene and comments.

11. On July 21, 2004, Oklaunion Electric Generating Coop, Inc. and Golden Spread Electric Coop, Inc. (collectively, the Cooperatives) filed a motion for leave to intervene out-of-time and protest. They request an indefinite stay of this case until contract issues regarding the validity of Brownsville's exercise of its right of first refusal have been resolved by the Texas courts. Cooperatives states that they are seeking a declaration from the 116<sup>th</sup> District Court for Dallas County that PUB has not validly exercised its right of first refusal and that its right of first refusal violates the Brownsville City Charter.<sup>8</sup> Alternatively, the Cooperatives request that the Commission "condition any approval of [the Transaction] upon a proper adjudication of the underlying issues of state law by the Texas courts."<sup>9</sup>

12. On July 23, 2004, OMPA filed correspondence clarifying aspects of certain matters that it addressed in its July 9, 2004 comments.

13. On July 28, 2004, OMPA filed an answer opposing the Cooperatives' July 21, 2004 request for a stay of this proceeding or a conditional approval.

14. On August 5, 2004, the Cooperatives filed additional comments arguing that the validity of the proposed transfer of jurisdictional assets from AEP Texas to Brownsville and the exercise by OMPA of its right of first refusal to acquire the assets should be resolved by the state court.

### **Discussion**

15. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2005), the timely, unopposed motion to intervene serve to make OMPA a party to this proceeding. We will grant the Cooperatives' motion to intervene out-of-time, given their interest in this proceeding, the early stage of the proceeding and the absence of any undue prejudice or delay.

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<sup>8</sup> Cooperatives' Protest at 6.

<sup>9</sup> *Id* at 9.

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or an answer unless otherwise ordered by the decisional authority. We will accept the answers of OMPA and the Cooperatives because they have provided information that assisted us in our decision-making process.

### **III. Section 203 Analysis**

17. Section 203(a) of the FPA provides that the Commission must approve a disposition of facilities if it finds that the disposition “will be consistent with the public interest.”<sup>10</sup> The Commission’s analysis under the Merger Policy Statement of whether a disposition is consistent with the public interest generally involves consideration of three factors: (1) the effect on competition; (2) the effect on rates; and (3) the effect on regulation.<sup>11</sup> As discussed below, we find that the Transaction is consistent with the public interest.

#### **A. Effect on Competition**

18. The Applicant argues that the Transaction raises neither horizontal nor vertical market power concerns and will not create barriers to entry. With regard to horizontal market power, AEP Texas notes that the Transaction does not involve a merger of two companies, but a transfer of partial ownership in generation facilities to entities that own or control less than one percent each of the approximate 77,000 MWs of generating capability located in ERCOT. Furthermore, the Applicant argues that as a result of the Transaction, AEP Texas’s ownership of generation will be reduced. The Applicant concludes that a horizontal competitive analysis screen is not required.

19. The Applicant also argues that a vertical market screen is not required because the Transaction does not involve a single corporate entity obtaining ownership or control

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<sup>10</sup> 16 U.S.C. § 824 (2000).

<sup>11</sup> *Inquiry Concerning the Commission's Merger Policy under the Federal Power Act: Policy Statement*, Order No. 592, 61 Fed. Reg. 68,595 (1996), FERC Stats. and Regs., Regulations Preambles July 1996-December 2000 ¶ 31,044 (1996), *reconsideration denied*, Order No. 592-A, 62 Fed. Reg. 33,341 (1997), 79 FERC ¶ 61,321 (1997) (Merger Policy Statement); *see also Revised Filing Requirements Under Part 33 of the Commission's Regulations*, Order No. 642, 65 Fed. Reg. 70,983 (2000), FERC Statutes and Regulations, Regulations Preambles July 1996-December 2000 ¶ 31,111 (2000), *order on reh'g*, Order No. 642-A, 66 Fed. Reg. 16,121 (2001), 94 FERC ¶ 61,289 (2001).

over one or more merging entities that provide inputs to electricity products. The Applicant notes that Brownsville owns 44 circuit miles of 69 kilovolt transmission lines that are in the City of Brownsville and are operated under the supervision of the ERCOT Independent Transmission Organization, and OMPA does not own any transmission facilities located in ERCOT. Furthermore, neither Brownsville nor OMPA controls gas pipeline capacity in ERCOT.

20. With respect to other barriers to entry, the Applicant states that the AEP operating companies are committed to participation in regional transmission organizations and that AEP Texas will continue to operate under the supervision of the ERCOT Independent Transmission Organization. This commitment, AEP Texas argues, will ensure the availability of non-discriminatory access to transmission facilities and related ancillary services in accordance with the open access policies directed by the Commission in Order 2000.<sup>12</sup>

21. The Applicant has shown that the Transaction would not harm competition in any relevant market. Both OMPA and Brownsville own or control a *de minimis* amount of electric generation capacity in ERCOT, and the divestiture of AEP Texas's generation capacity will deconcentrate the ERCOT market by transferring control of generation from a large supplier to one or two smaller suppliers in the market. In addition, the Transaction would not create or enhance vertical market power because neither Brownsville nor OMPA owns or controls inputs for electricity production in the relevant market, nor do they have operational control of any transmission facilities. We note that there were no protests regarding the Transaction's effect on competition.

## **B. Effect on Rates**

22. The Applicant argues that the Transaction will not have any adverse impact on the rates paid by the wholesale customers of AEP Texas. The Applicant reasons that these customers purchase electricity from AEP Texas or its affiliates at fixed rates, which will be unaffected by the Transaction.

23. Cooperatives argue that the pending litigation in the Texas courts would affect rates by exposing AEP Texas and Brownsville to contractual liabilities for damages.<sup>13</sup>

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<sup>12</sup> *Regional Transmission Organizations*, Order No. 2000, 65 Fed. Reg. 809 (January 6, 2000), FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, 65 Fed. Reg. 12,088 (March 8, 2000), FERC Stats. & Regs. ¶ 31,092 (2000), *aff'd sub nom. Public Utility District No. 1 of Snohomish County, Washington v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>13</sup> Cooperatives' Protest at page 8.

They further argue that the potential liability can be avoided by a determination from the Texas courts regarding the rights of the parties and conclude that the Commission should defer action on Applicants' request or condition any authorization of the Transaction upon resolution of the Texas court proceedings.

24. The Applicant argues in response that Cooperatives' argument is speculative and does not justify delay or a condition. It says that Cooperatives do not point to any adverse affect that would result from the Commission authorizing the Transaction and that the outcome of the litigation is beyond the scope of this proceeding.<sup>14</sup>

25. We agree with the Applicant's argument that the Transaction will not result in increased wholesale rates. Presumably, Cooperatives are arguing that the pending litigation could increase the rates of AEP Texas and Brownsville's wholesale customers by creating costs that would be passed on to captive ratepayers. However, all of AEP Texas's wholesale customers' rates are fixed, so they cannot be affected by the Transaction. Any other contractual issues relating to the pending litigation are beyond the scope of this proceeding. Therefore, we find that the Transaction will not adversely affect rates.

### **C. Effect on Regulation**

26. The Applicant states that the Transaction will not impair the ability of the Commission or of any state commission to regulate AEP Texas. The Transaction does not result in the formation of a new holding company that could lead to the Commission's jurisdiction being pre-empted by the Securities and Exchange Commission (SEC).<sup>15</sup> It notes that AEP Texas is already part of a registered holding company system and that in connection with the merger of American Electric Power and Central and South West Corp., has committed to this Commission's review of affiliate dealings.<sup>16</sup>

27. Cooperatives argue that because of the potential and yet undefined adverse effect on regulation, the Commission cannot find the Transaction to be in the public interest. They state that if they are correct, and under Texas law, a contract for the sale of assets to

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<sup>14</sup> Applicant's Answer at page 5, citing *Commonwealth Atlantic Limited Partnership*, 97 FERC ¶ 61,375 (2001).

<sup>15</sup> Merger Policy Statement at 30,125.

<sup>16</sup> *American Electric Power Co. and Central and South West Corp.*, Opinion No. 442, 90 FERC ¶ 61,242 (2000).

Brownsville would be void, then the Transaction would create uncertainty about regulated assets that could be detrimental to the public interest.<sup>17</sup>

28. The Applicant argues in response that Cooperatives' argument is speculative and does not justify delaying or conditioning section 203 authorization. It further argues that Cooperatives do not point to any adverse affect that would result from the Commission authorizing the Transaction, and that the outcome of the litigation is beyond the scope of the proceeding.<sup>18</sup>

29. The Applicant has shown that the Transaction will not affect federal or state regulation. The Transaction does not impair any state's ability to regulate AEP Texas. We note that no state Commission intervened. As noted in the application, the Transaction will not result in the creation of a new holding company system that would shift jurisdiction from the Commission to the SEC. Any contractual issues relating to the pending state court litigation are beyond the scope of this proceeding.<sup>19</sup>

#### **D. Accounting**

30. We find that AEP Texas's proposed accounting for the Transaction is consistent with the Commission's Uniform System of Accounts. AEP Texas submitted its proposed journal entries to account for the sale of its 7.81% ownership interest in the 690 MW Oklaunion Unit No. 1 generating facility to the City of Brownsville, Texas, or, alternatively, to Brownsville and OMPA. However, since this transaction is a sale of an operating unit or system, the Applicants must file their proposed journal entries with the Commission to clear Account 102, Electric Plant Purchased or Sold, as required by the instructions to such account, within six months of the date the Transaction is consummated.

#### **The Commission orders:**

(A) The Applicant's request for Commission authorization for a disposition of jurisdictional facilities is accepted, as discussed in the body of this order.

(B) The foregoing authorization is without prejudice to the authority of the Commission or any other regulatory body with respect to rates, service, accounts,

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<sup>17</sup> Cooperatives' Protest at page 8.

<sup>18</sup> Applicant's Answer at page 5, citing *Commonwealth Atlantic Limited Partnership*, 97 FERC ¶ 61,375 (2001) (*Commonwealth*).

<sup>19</sup> *Commonwealth* at 32.



valuation, estimates or determinations of costs, or any other matter whatsoever now pending or which may come before the Commission.

(C) Nothing in this order shall be construed to imply acquiescence in any estimate or determination of cost or any valuation of property claimed or asserted.

(D) The Commission retains authority under sections 203(b) and 309 of the FPA to issue supplemental orders as appropriate.

(E) If the transfer results in changes in the status or the upstream ownership of Applicants' affiliated Qualifying Facilities, if any, an appropriate filing for recertification pursuant to 18 C.F.R. § 292.207 (2005) shall be made.

(F) The Applicant shall make appropriate filings under section 205 of the FPA, as necessary, to implement the Transaction.

(G) The Applicant shall notify the Commission within 10 days of the date that the disposition of the jurisdictional facilities has been consummated.

(H) The Applicant shall account for the transfer of facilities in accordance with the instructions to Account 102, Electric Plant Purchased or Sold, of the Uniform System of Accounts and file, within six months of the date of the Transaction, detailed journal entries, with any narrative statements necessary to explain the proposed accounting, including related income tax consequences.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.